No. 79-678

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
a corporation,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation; PETE WILSON, Mayor; F. GILBERT JOHNSON, MAUREEN O'CONNOR, LEE HUBBARD, LEON L. WILLIAMS, FLOYD L. MORROW, JIM BATES, ROBERT MARTINET, and JAMES ELLIS, Members of the City Council of San Diego; JAMES L. GOFF, Planning Director of the City of San Diego; and DOES I through XXV, inclusive,

Appellees.

On Appeal From The California Court Of Appeal,
Fourth Appellate District, Division One

BRIEF OF APPELLEE

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QUESTIONS PRESENTED*

1. Did the regulatory actions and/or conduct of the City of San Diego have the effect of denying appellant all reasonable, beneficial use of its property in violation of the Fifth and Fourteenth Amendments of the United States Constitution?

2. If the answer to the preceding question is yes, do the Fifth and Fourteenth Amendments compel a remedy of inverse condemnation, forcing the purchase of the property by the public entity imposing the regulations where no physical invasion takes place, no existing use is disturbed, and where no intent to condemn property was present, as opposed to invalidation, injunction or other form of relief?

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* Pursuant to Rule 34.2, appellee restates the questions presented, but by doing so does not concede that the Court has jurisdiction. The jurisdictional issues are presented in that section of this brief.

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BRIEF OF APPELLEE

JURISDICTION

In response to appellant's jurisdictional statement, appellee filed a motion to dismiss, raising jurisdictional issues.

This Court, by its order of June 16, 1980, postponed consideration of the question of jurisdiction to the hearing on the merits.

Appellant asserts jurisdiction by appeal under 28 U.S.C. Section 1257(2), or alternatively by writ of certiorari under 28 U.S.C. Section 2103.

Appellee contends that the federal question sought to be reviewed was not expressly passed on; the judgment rests on an adequate nonfederal basis; and the appeal does not present a substantial federal question.

1. Appellant Has Not Drawn Into Question The Validity Of A Statute As Being Repugnant To The Constitution.

Both 28 U.S.C. Section 1257(2) and 28 U.S.C. Section 1257(3) provide jurisdiction where a statute is claimed to violate the Constitution.

Appellant has not contended that legislative enactments in themselves had the effect of violating the Constitution--rather it has claimed, and the trial court found, that a "continuing course of conduct," including rezoning of some of its property, adoption of an open space plan, preparation of open space financing plans, placing bond propositions on the ballot and other planning activities constituted a "taking" of its property.

Appellant's theory of the case rests not on the effect of legislation on its property, but on a course of conduct which it perceives as being based upon illicit motive to acquire its property for open space at a reduced value or to preclude any use so that acquisition is unnecessary.

The motives of legislators in enacting legislation is irrelevant to the issue of constitutionality of the legislation. *United States v. O'Brien,* 391 U.S. 367, 383 (1968). This rule is adhered to in California with the exception of unreasonable precondemnation conduct. *Pinheiro v. County of Marin,* 60 Cal.App.3d 323, 327-328 (1976). The exception is not dependent upon the validity of the legislation and the remedy for such actions is recovery of damages in the eminent domain action. *Klopping v. City of Whittier,* 8 Cal.3d 39, 52 (1972).

2. The Open Space Plan Is Not A "Statute".

The term "statute" as used in 28 U.S.C. Section 1257(2) has been interpreted to mean "any enactment from whatever source originating, to which a State gives the force of law." *Lathrop v. Donohue,* 367 U.S. 820, 824 (1961). The adoption of an open space plan by a city council resolution, while arguably an "enactment," does not have the force of law in that it is merely a planning designation. *Selby Realty Co. v. City of San Buenaventura,* 10 Cal.3d 110, 119-120 (1973).

3. The Decision Appealed From Did Not Hold Legislation Valid.

The opinion appealed from does not hold the zoning ordinance and open space plan valid nor invalid. Instead, it states that the assertions that appellee City arbitrarily exercised the police power by enacting an unconstitutional zoning law and open space plan or applying them unconstitutionally are disputed fact issues not covered by the trial court.

In order for jurisdiction to lie under 28 U.S.C. Section 1257(2), the decision appealed from must have passed on the validity of the statute. *Wilson v. Cook,* 327 U.S. 474, 481 (1945). Something more than a claim of federal right is necessary; the attack must be upon the *validity* of the

order, not merely upon the court's judgment. *Live Oak Water Users' Asso. v. Railroad Commission,* 269 U.S. 354, 357 (1925).

4. The Judgment Rests On An Adequate Nonfederal Basis.

The issue of appellant's failure to exhaust its administrative remedies by applying for development permits on its property or relief from the land use restrictions was raised by appellee at trial and the appeals.

By the Court of Appeal reciting that appellant made no application for use of its property and then stating, "Even assuming no use is acceptable . . ." it is apparent that the Court of Appeal felt appellant had not established a denial of all use of its property. It is well settled law in California that the doctrine of exhaustion of administrative remedies applies to constitutional challenges of zoning ordinances. *Metcalf v. County of Los Angeles,* 24 Cal.2d 267 (1944).

This Court should therefore dismiss this appeal as the decision is based upon state law rather than a federal question. *Copperweld Steel Co. v. Industrial Com.,* 324 U.S. 780, 785 (1944).

5. The Appeal Does Not Present A Substantial Federal Question.

a. The Decision Of The Court Of Appeal Is Not As Sweeping As Appellant Suggests

The decision below does not hold, as appellant contends, that a property owner may *never* recover money damages as a remedy for an unconstitutional exercise of the police power.

It merely states that such an exercise of the police power does not "require" compensation, citing the case of *Agins v. City of Tiburon,* 24 Cal.3d 266 (1979), and is obviously limited to the facts here. Among those facts are: Appellant's failure to apply for development of its property; no use of the property by appellant; no actual public use of the property; no formal actions by the City to condemn the property or firm declaration of intent to condemn it; the City's engaging in mere planning

activities for potential acquisition; and rezoning of portions of the property which recognized the nature of the property.

The Court of Appeal decision here, as well as the *Agins v. City of Tiburon, supra,* 24 Cal.3d 266 case, did not disturb the line of cases involving unreasonable precondemnation conduct where money damages may be awarded. *Agins, supra,* at pp. 277-278.

b. The Fifth Amendment Does Not Compel A Remedy Of Forced Purchase Of Property By Way Of Inverse Condemnation For Exercises Of The Police Power Which Exceed Constitutional Limits

This point is discussed in the argument below.

STATEMENT OF THE CASE

Appellant's statement of the case is argumentative, contains errors of fact and is misleading due to certain omissions of fact. The salient facts to the case are as follows:

1. The Subject Property.

The real property owned by appellant ("SDG&E") which is the subject of this litigation lies in the northwest part of San Diego, in the southwest quadrant of the intersection of Interstate Highway I-5 and Carmel Valley Road. The freeway abuts the property to its east. To its west is the Torrey Pines State Park and the Pacific Ocean.[1]

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[1] See Plaintiff's Exhibit 1 [Reporter's Transcript (R.T.) 6, 61]. For convenience, a map, which is not part of the record, is contained in Appendix A herein, to show the location of the property.

The property which was described in SDG&E's complaint constitutes about 255 to 260 acres[2] and was acquired by SDG&E in 1966 as a potential site for a nuclear power plant, including a buffer zone.[3] It was purchased by SDG&E for the sum of approximately $1,770,000.00.[4]

The property is at a low elevation and is a drainage basin and floodplain at the confluence of three river systems that drain approximately 100 square miles.[5] It is characterized as tidal flats or marshland[6] and a portion is subject to ocean tidal action.[7]

The property is referred to as the Los Penasquitos Lagoon, and is an estuary or wildlife refuge.[8] It is also subject to ponding resulting from rain.[9]

The zoning on the subject property when acquired by SDG&E and up to the rezoning in 1973 consisted of approximately 116 acres in the M-1A

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2 Clerk's Transcript (C.T.) 125:17-18; R.T. 9:16. Subsequently stipulated to be: 229 acres plus 3.62 acres leased (all east of railroad tracks). Parcel west of tracks is 12.85 acres. R.T. 705.

3 R.T. 8:5-10; C.T. 125:11-14. Additional properties were purchased by SDG&E for this purpose to the north of Carmel Valley Road and to the east of Interstate I-5, making a total of 412 acres (see map, Appendix A). C.T. 125:14-16; R.T. 6:23-26--7:1-11; 8:11-12. The property was acquired as an assemblage from several different owners. R.T. 125:11-20; R.T. 8:9-11; 9:20-22.

4 R.T. 9:19.

5 R.T. 311:10-11; 312.

6 R.T. 7:1-2.

7 R.T. 925:13-23; Plaintiff's Exhibit 16 [R.T. 102, 106].

8 C.T. 126:5-7; R.T. 147-148; 311:8-9; 537:12-13.

9 R.T. 312:9-11; 929:12-19; Defendant's Exhibits N, O, P and Q [R.T. 920, 1108].

Zone[10] (industrial). 112 acres in the A-1-1 Zone[11] (agricultural or holding), and 13 acres in the R-1-5 Zone[12] (single family residential).[13]

All but a small portion of the property (at the extreme southeast end) lies within the California Coastal Zone[14] as described by the California Coastal Zone Conservation Act of 1972 and was subject to the provisions of that Act requiring permits for development.[15]

The majority of the property was designated for industrial use by San Diego's first general plan in 1967 and remained so designated. The remaining portion was designated as "area for future growth" by the general plan.[16]

In order to utilize the 150 acres physically adaptable for industrial use it was necessary that three to four feet of fill soil be placed over the property to surcharge (compact unstable soils) the natural soil and to elevate structures to protect against flooding.[17]

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10 Relevant portions of this zone, then in effect, adopted by Ordinance No. 9408 (New Series) are set forth in Appendix B herein. Federal Rules of Evidence, Rule 201.

11 Relevant portions of this zone adopted by Ordinance No. 8706 (New Series) are set forth in Appendix C.

12 Single family dwelling units--minimum 5,000 square foot lot.

13 C.T. 126; Plaintiff's Exhibit 1 [R.T. 6, 61]. For convenience, a map which is not part of the record, is included in Appendix D herein to show the various zoning on the property.

14 R.T. 150-151; 931:1-4; 952:12-15.

15 California Public Resources Code, Section 27000, *et seq.* added by initiative act. Succeeded by the California Coastal Act of 1976, Pub. Res. Code, Section 30000, *et seq.* Pub. Res. Code, Sections 27104, 27400.

16 Plaintiff's Exhibit 9 [R.T. 22, 61].

17 R.T. 130, 132-133; Joint Appendix [J.App.] 116.

Since its purchase, the property has not been developed or used by SDG&E with the exception of utility easements and a single family residence, and is currently in the same state.[18] SDG&E has never applied to the City to develop the property.[19]

2. The City's Actions--Rezoning.

In 1972 the San Diego City Council initiated hearings to consider rezoning the subject property as well as property to the south and west.[20] The Council's concern arose at a zoning hearing on hillside property to the north when the adverse effects on the Los Penasquitos Lagoon was brought to the Council's attention.[21]

As a result of the rezoning hearings, portions of the subject property as well as adjoining properties were rezoned by the adoption of an ordinance on June 21, 1973.[22]

As it affected SDG&E's property, the 38 acres in the northwest were rezoned from M-1A to A-1-10, the 13 acres to the north from R-1-5 to A-1-10, and the 50 acres to the northeast from A-1-1 to A-1-10.[23] Approximately 79 acres zoned M-1A and 48 acres zoned A-1-1 were unchanged.

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18 R.T. 69:11-13; 153:4-7; 530:13-15.

19 R.T. 153:4-7.

20 R.T. 23:23-26; 24:1; 379:7-26; 380:1-7.

21 R.T. 379:7-19.

22 Plaintiff's Exhibit 43 [R.T. 645, 828]. Jurisdictional Statement Appendix (J.S.App.) K-12; R.T. 382:2-6. The rezoning ordinance was introduced on June 7, 1973. J.App. 40, No. 22.

23 Plaintiff's Exhibit 1 [R.T. 6, 61]; R.T. 34; 380:15-26; 381-382. For convenience, a map, not part of the record, is included in Appendix E herein showing the result of the rezoning in 1973 (compare with Appendix D).

The City Planning Department recommended, and the City Council agreed at the rezoning hearing, to retain the southeastern portion of the property in the A-1-1 Zone, but that future rezoning to light industrial use would be appropriate upon application and appropriate mitigating measures.[24]

The Planning Department believed that the rezoning would provide a zoning pattern that recognized the unique environmental characteristics of the area.[25]

3. The City's Actions--Open Space.

In 1970 and 1971 the California Legislature enacted open space planning laws requiring open space planning as part of the general plan.[26]

During the early part of 1972 the City Planning Department began to prepare an open space plan to meet the state mandated deadline of June 30, 1973.[27] This effort culminated in the adoption of an open space plan entitled, "A Plan For The Preservation Of Natural Parks For San Diego" (hereinafter "Open Space Plan") on June 19, 1973.[28]

The Open Space Plan encompassed some 51,000 acres within San Diego, 11,000 acres recommended for acquisition and 17,000 acres designated for "limited development under zoning."[29]

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24 Plaintiff's Exhibit 43 [R.T. 645, 828]; R.T. 34:14-18; 35:7-12; 381:10-17.

25 Plaintiff's Exhibit 43 [R.T. 645, 828].

26 California Government Code, Sections 65302(e), 65561, 65563 (J.S.App. K-5; K-6).

27 California Government Code, Section 65563. The deadline was extended to December 31, 1973 by amendment on June 29, 1973. R.T. 161-164.

28 Plaintiff's Exhibit 11 [R.T. 36, 39]; J.App. 41, No. 23; J.S.App. K-10.

29 Plaintiff's Exhibit 11, p. 15 [R.T. 36, 39].

As the Open Space Plan affected SDG&E's property, 214 acres were designated as open space and proposed for acquisition.[30]

In the early part of 1972, the City Community Development Department began planning for City acquisition of open space lands. This department prepared a staff report entitled, "Park Reserve Systems," dated April 29, 1973,[31] which discussed the financing and acquisition of park reserve lands.

The Community Development Department obtained rough estimates of value of properties, including portions of SDG&E's, proposed to be acquired in the preparation of the report and for a bond ballot proposal.[32]

On April 17, 1973, the City Council adopted a resolution determining that the public interest and necessity demand the acquisition and improvement of park reserve areas to be subsequently identified and authorizing bonded indebtedness for said purpose.[33] Said resolution was a prerequisite for incurring bonded indebtedness under San Diego City Charter Section 90.[34]

In September of 1973 a ballot proposition for bonds to purchase open space lands in the City failed to be adopted by the required vote of the electorate.[35]

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30 Plaintiff's Exhibits 1 [R.T. 6, 61]; 11 [R.T. 36, 39] and 11a [R.T. 38, 39]; R.T. 705-706. See Appendix F herein for illustration.

31 Plaintiff's Exhibit 14 [R.T. 44, 61]. The purpose of the report was stated as ". . . establishing a broad guideline for future acquisition. . . ." It provides: "It is not the intent, by creating this report . . . to specifically designate any particular property for acquisition. . . ." (at p. 1).

32 R.T. 237-239; 397; 399.

33 Plaintiff's Exhibit 24 [R.T. 242, 302]; J.S.App. K-8.

34 Relevant portions of Charter Section 90 are set out in Appendix G herein.

35 R.T. 244; J.App. 41, No. 25.

No eminent domain action was filed by the City to acquire SDG&E's property, no resolution authorizing condemnation was adopted, and no monies were appropriated for the acquisition of the property.

A hearing on the Open Space Plan before the Planning Commission commenced on May 16, 1973, and was continued to May 23, 1973. During the intervening week changes were made to the text of the proposed plan and in the amount of the property designated as open space. The changes in acreages were due in part to discrepancies between efforts of the Community Development Department and the Planning Department which were discovered at the initial Planning Commission hearing.[36]

One of these changes involved the SDG&E property. The effect of the change was to propose more of the SDG&E property be designated for open space.[37]

A change in the text affecting the SDG&E property was the addition of language to the effect that a nuclear power plant, depending upon design and siting, could be compatible with open space.[38] This change was brought about by representatives of SDG&E expressing concern over the effect of the plan on its property during the continued hearing.[39]

The changes that were made in the proposed open space plan were reflected in an addendum which was made available at the continued

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36 R.T. 70-72; 169; 224-226.

37 Compare Plaintiff's Exhibit 10a [R.T. 31, 39] with 11a [R.T. 38, 39]. Approximately 114 additional acres were included in the revised plan as opposed to approximately 102 acres originally proposed. R.T. 31:22-26; 36:11-26.

38 Plaintiff's Exhibit 11, p. 24 [R.T. 36, 39]; J.App. 160.

39 R.T. 70:9-26; 71; 72.

hearing on May 23, 1973,[40] and in large exhibit maps used at the hearings, but the maps and text in the plan booklets which had previously been distributed were not changed for the continued hearing.[41]

On March 6, 1975, the City Council adopted the Torrey Pines Community Plan, which included the SDG&E property.[42] In that community plan, which was incorporated into the City general plan on June 26, 1975,[43] only the northerly portion (approximately 100 acres) of the subject property was designated as open space.

4. The Litigation.

SDG&E filed the complaint on August 15, 1974. The complaint, as amended, alleged that the actions of the City and its officers and employees were arbitrary, oppressive, unreasonable exercises of the police power and constituted an unlawful taking or damaging of its property, and as a result SDG&E was denied any possible beneficial use of its property.[44]

SDG&E also sought declaratory and injunctive relief on the basis that the rezoning and Open Space Plan were invalid and unconstitutional because adopted without notice, and were arbitrary, oppressive and unreasonable.[45]

A separate trial on the issue of liability commenced on January 19, 1976, by the court without a jury.

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40 Defendant's Exhibit A [R.T. 180, 395]; R.T. 179; 206.

41 R.T. 179; 226; Plaintiff's Exhibits 20 and 21 [R.T. 167, 184].

42 Defendant's Exhibits D [R.T. 345, 394] and E [R.T. 346, 394].

43 Defendant's Exhibit F [R.T. 346, 394].

44 C.T. 3-8; J.App. 6-11.

45 C.T. 38-40; J.App. 32-34.

The trial court concluded that the 214 acres of SDG&E's property which had been designated as open space in the Plan had been taken by the actions of the City as of June 19, 1973, that SDG&E had suffered severance damage to remainder parcels[46] and approved findings of fact and conclusions of law.[47]

The second phase of the trial proceeded on the issue of fair market value of the property deemed taken. A judgment was entered pursuant to a jury verdict awarding $2,886,300.00 as the fair market value of the parcel taken, $283,696.00 in severance damages to the remainder parcels, and $122,559.07 in fees plus interest on the value of the property taken and severance damages.[48]

City appealed the issue of liability to the Court of Appeal, Fourth Appellate District, Division One.

The Court of Appeal upheld the judgment on May 17, 1978. City sought a rehearing based on factual errors, misstatements of City's position, errors of law and other grounds. On June 13, 1978, the Court of Appeal modified its opinion and denied a rehearing by a two-to-one vote.[49]

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46 R.T. 411; 413:10-24; 705; C.T. 210:25-26; 211:1-5. The remainder parcels are located between Sorrento Valley Road and Interstate I-5 and comprise approximately 19 acres. R.T. 706.

47 C.T. 203; J.App. 35.

48 C.T. 263; J.App. 44.

49 J.App. 48; J.S.App. C-1.

The California Supreme Court granted a hearing on July 13, 1978.[50] On June 14, 1979, it transferred the case back to the Court of Appeal for reconsideration in light of its decision in *Agins v. City of Tiburon, supra,* 24 Cal.3d 266.[51]

Throughout its appeals City has maintained that there is no substantial evidence in the record which supports the trial court's findings to the effect that: City's actions deprived SDG&E of all practical, beneficial or economic use of its property; it would have been futile for plaintiff to have applied to City for development of its property; and the property had been devoted to use by the public as open space.

The Court of Appeal reversed the judgment in an opinion not certified for publication stating:

> [SDG&E] has not made application to use or improve the property nor has it asked City what development might be permitted. Even assuming no use is acceptable to the City, Company's complaint deals with the alleged overzealous use of the police power by City. Its remedy is mandamus or declaratory relief, not inverse condemnation. Company did in its complaint seek these remedies. . . . However, on the present record these are disputed fact issues not covered by the trial court in its findings and conclusions.[52]

SDG&E was denied a rehearing in the Court of Appeal and a hearing in the California Supreme Court.[53] Thus, it is from the unpublished opinion of the Court of Appeal that SDG&E seeks this appeal.

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50 J.S.App. D-1. The effect of the granting of a hearing is to supersede and render the Court of Appeal decision a nullity, of no force or effect. California Rules of Court, Rule 976(d); *Knouse v. Nimocks,* 8 Cal.2d 482, 483 (1937).

51 J.S.App. E-1.

52 J.App. 63, 66.

53 J.S.App. H and I.

SUMMARY OF ARGUMENT

1. The Record Does Not Support The Finding That The Regulations Effectively Denied All Reasonable Use Of The Property.

The trial court's findings of fact have been rejected by the Court of Appeal. The decision below states that SDG&E has made no application to develop its property but does not agree with the trial court's finding that SDG&E was excused from doing so and it held that there are disputed fact issues not covered by the trial court.

a. The rezoning affected only 100 acres out of the total 228 acres of the property. Of the 100 acres rezoned, only 38 acres changed the basic use (from industrial to agricultural). That 38 acres was subject to ocean tidal action and is a wildlife sanctuary where development would be impractical according to SDG&E. Industrial zoning remained on parts of the property and industrial use was allowed by conditional use permit on the rest.

b. The Open Space Plan did not preclude reasonable industrial development on the property. By its terms it allowed the very intended use for which the property was purchased (nuclear power plant). The City Council stated it would entertain a development plan for industrial use of the property at the rezoning hearings. A general plan designation in California is tentative and cannot constitute a firm declaration of intent to condemn property for public use. *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 116.

San Diego as a charter city was not bound by state statutes to reject all development applications which were inconsistent with the Open Space Plan. California Government Code, Sections 65700, 65803. But even if it were, there is sufficient discretion in applying the term "consistency" that reasonable industrial use could be allowed. *Sierra Club v. County of Alameda,* 73 Cal.App.3d 572 (1977).

c. The other conduct of the City involved only reasonable planning efforts to acquire open space lands which are nonactionable. *Agins v. City of Tiburon,* ____ U.S. ____, 65 L.Ed.2d 106, 113, n. 9 (1980).

d. The conclusion that the only reasonable use of the property was industrial was based upon economic feasibility from an investment standpoint and witnesses ruled out many allowable uses simply because the general plan designated it industrial.

e. There was no actual public use of the property, no use existed and no applications for use were denied.

2. SDG&E May Not Seek Judicial Relief From The Application Of The Regulations Without Applying For Development.

SDG&E was required to apply for development in order that the specific application of the land use designations could be determined. *Agins v. City of Tiburon, supra,* ____ U.S. ____, 65 L.Ed.2d 106, 111. California law is in accord unless it can *positively* be said what the action will be in advance of application. *People v. Superior Court,* 91 Cal.App.3d 95, 104-105 (1979). To bypass this process denied City the opportunity to strike a reasonable balance between public and private interests.

SDG&E's witnesses' testimony was pure speculation and did not excuse it from making application for development.

3. Reasonable Land Use Regulations Are Valid Exercises Of The Police Power And Resulting Loss Of Value Is Noncompensable.

The police power is one of the least limitable and often cuts down property rights. *Queenside Hills Realty Co. v. Saxl,* 328 U.S. 80, 83 (1946). Land use regulations have been upheld notwithstanding

substantial diminution in value of property or denial of the most profitable use. *Hadacheck v. Sebastian,* 239 U.S. 394, 405 (1915); *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 592 (1962).

The regulations here serve recognized police power objectives. *Agins v. City of Tiburon, supra,* ____ U.S. ____, 65 L.Ed.2d 106, 112.

4. The Regulations Have Not Violated Constitutional Rights.

SDG&E's reasonable investment-backed expectations were not frustrated. A property owner has no vested rights in existing or anticipated zoning. *Hadacheck v. Sebastian, supra,* 239 U.S. 394, 410. SDG&E had no reasonable right to expect the zoning would remain unchanged on its property or that it could obtain necessary rezonings when it decided to carry out its plans years after purchase. SDG&E told City the rezoning would not affect its long-range plans, and it could not reasonably expect to substantially alter environmentally sensitive wetlands and a floodplain by placing three to four feet of fill on it in order to make the most profitable use. To condone such a contention would allow economics to dictate the use of economically marginal and environmentally sensitive lands rather than considerations for the general welfare (here, flood protection and wetlands preservation).

The important governmental interests involved here when balanced against SDG&E's desire to make the most profitable use of its land result in no unfairness to the property owner.

5. Even If The Regulations Were Overly Burdensome, The Appropriate Remedy Is Not Inverse Condemnation.

There is no precedent for requiring damages for an exercise of the police power where no physical invasion of property rights has occurred. *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) was an equitable action and did not state that damages were an appropriate remedy. Use of the term "taking" is used by the courts in the due process sense, not

eminent domain. *Fred F. French Investment Co. v. City of New York,* 385 N.Y.S.2d 5, 8-10 (1976).

Cases relied on by appellant involve eminent domain, physical damage, contractual rights or instances where monies have been appropriated to carry out public projects by eminent domain.

Physical invasions are treated differently. *Kaiser Aetna v. United States,* 444 U.S. 164 (1979).

The constitution does not compel a damage remedy. In a regulatory situation there is no "public use" such as is contemplated by the takings clause. The constitution is satisfied when the burdensome regulation is invalidated. If the public entity wishes to accomplish its purpose it must then pay compensation.

The California Supreme Court has left inverse condemnation available in certain circumstances and will compel the issuance of permits. Appellant's fears that equitable remedies are inadequate are unfounded. There is no justification for a punitive remedy for exercises of the police power which may stray over the permissible line.

To provide an inverse condemnation remedy would violate the separation of powers doctrine by giving the discretion of when to expend public funds for condemnation to the courts. It would also have a chilling effect upon legislative bodies in exercising their duty to deal with ever increasing land use problems due to the real threat of bankrupting the public entity as a result of an error in judgment which could not be determined in advance. Planning activities such as the Open Space Plan here would have to cease or be conducted in secret without public participation.

For these reasons the decision below should be affirmed.

ARGUMENT

I

THIS IS NOT A "TAKING" CASE

A. THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S CONCLUSION THAT REGULATORY ACTIONS AND CONDUCT BY THE CITY EFFECTED A DENIAL OF ALL PRACTICAL, BENEFICIAL USE OF APPELLANT'S PROPERTY

The trial court's findings of fact have in effect been rejected by the Court of Appeal. The decision appealed from states that SDG&E has made no application to develop its property but does not agree with the trial court that SDG&E was excused from doing so because it would have been futile. It also states that there are disputed fact issues as to an arbitrary exercise of the police power or application of the zoning and general plan which are not covered by the trial court.

Even if the trial court's findings were not repudiated, this Court will review findings where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the federal question. *Fiske v. Kansas,* 274 U.S. 380, 385-386 (1926); *Norris v. Alabama,* 294 U.S. 587, 589-590 (1934). The trial court's findings were intermingled with the legal conclusion of a "taking" here.

1. The Change In Zoning.

The rezoning affected only about 100 acres out of the total 228 acres of property. Of that 100 acres rezoned, only 38 acres was changed as relates to permitted uses under the zoning (from an industrial zone to an agricultural or holding zone). Of the remaining 60+ acres, about 13 acres was changed from a single family residential zone to agricultural or holding zone and about 50 acres was changed only in density of dwelling units allowed in an agricultural or holding zone. (See Appendices D and E.)

That this rezoning had little or no practical effect on SDG&E's property is demonstrated by the following:

a. SDG&E's intended use of the property (nuclear power plant) was not a permitted use under the zoning on the property when purchased;[54]

b. SDG&E's intended use, as well as other industrial uses not specifically permitted in the agricultural zones, were permitted by conditional use permit;[55]

c. The A-1 (agricultural) Zone may be applied as a "holding" zone, *i.e.*, to "undeveloped areas not yet ready for urbanization and awaiting development" as well as where agricultural uses may be reasonable;[56]

d. The 38 acres rezoned from M-1A to A-1-10 is in the area subject to tidal action where the lagoon or estuary is located and was not considered feasible for development and would not be developed in order to secure necessary permits according to SDG&E's witness;[57]

e. The rezoning of the 60+ acres merely changed the permitted density of dwelling units on property which SDG&E's witness testified was not suitable for residential purposes due to flooding and other considerations.[58]

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54 The closest use under the M-1A Zone (by incorporation of uses in the M-1 Zone) is "central electric plant" (see Appendix B herein). Arguably a non-nuclear power plant might fall within this use.

55 J.App. 149-150.

56 See Appendix C herein.

57 R.T. 102-105, 137; J.App. 105-106, 109, 112-113; Plaintiff's Exhibit 16 [R.T. 102, 106].

58 J.App. 104.

2. The Open Space Plan.

The testimony of SDG&E's witnesses and the finding of the trial court as to the effect of the Open Space Plan on the property were based upon the erroneous legal conclusion that state law required consistency of any development with the plan.[59]

Mr. Rick and Mr. Gallagher, SDG&E's engineer/planner and appraiser witnesses, concluded no use was permissible after adoption of the Open Space Plan unless consistent with open space, based upon *legal* advice as to the effect of that plan by SDG&E's attorneys.[60] Mr. De Vore, SDG&E Director of Governmental Affairs, testified that he understood the effect of the Open Space Plan was to constitute an open space overlay zone that took precedence over the underlying agricultural and industrial zoning on the property.[61] Mr. Worley, one of the attorneys whose opinion was relied on by the witnesses, testified it was his opinion that state law required denial of any development if not consistent with the Open Space Plan.[62]

That the Plan could not have the effect attributed by the witnesses is seen from the following:

a. The Nature Of A General Plan.

Under California law, a general plan is a statement of development policies, including diagrams and text, setting forth objectives, principles and proposals in order that it will serve as a pattern and guide for the

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59 Appellant also argues that City had a policy of requiring consistency. As will be shown, there is no evidence to support that conclusion nor was there any finding of fact to that effect by the trial court.

60 R.T. 141-144; J.App. 110-111, 122-123.

61 J.App. 76.

62 R.T. 95-96. Mr. Worley admitted he was attorney of record in a pending action against City in which the same contention was being made. R.T. 98.

orderly physical growth and development, and as a basis of efficient expenditure of local funds relating to the subjects of the plan and capital improvements.[63]

The general plan is not self-executing. To have meaningful effect it must be implemented through zoning ordinances, decisions with respect to zoning applications or expenditure of capital funds.[64]

San Diego's general plan map (Plaintiff's Exhibit 9) states in its legend:

> NOTE: This map represents General Plan land use and circulation policies and proposals in a generalized, graphic form. It is not a zoning map and should not be so construed.

SDG&E contends, and its witnesses' testimony was based on the premise that state legislation in 1973 effectively wiped out the distinction between planning and zoning in California by requiring all development to be consistent with the general plan.[65]

The California Supreme Court acknowledged the existence of the "consistency" legislation in *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 116, where the plaintiff there claimed the adoption of a general plan showing proposed public streets on its property amounted to a "taking" of its property, but nonetheless concluded:

> Neither *Klopping* nor any other decision of which we are aware holds that the enactment of a general plan for the future development of an area, indicating potential public

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63 Calif. Gov. Code §§ 65302, 65400; *O'Loane v. O'Rourke,* 231 Cal.App.2d 774 (1965); *The Local "General Plan" in Calif.,* 9 S.D.L.Rev. 1, 2 (1971).

64 *O'Loane v. O'Rourke, supra,* 231 Cal.App.2d 774, 780; 9 S.D.L.Rev., *supra,* 1, 22; 5 Pac.L.J. 55, 68 (1974).

65 SDG&E relies on Calif. Gov. Code §§ 65860, 65567 and 66474.

> uses of privately owned land, amounts to inverse condemnation of that land.
>
> . . . .
>
> . . . The adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property. . . . The county has not placed any obstacles in the path of plaintiff in the use of its land. Plaintiff has not been refused permission by the county to build on or subdivide its county land. . . . Furthermore, the plan is subject to alteration, modification or ultimate abandonment, so that there is no assurance that any public use will eventually be made of plaintiff's property.
>
> *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 119-120.[66]

b. The "Consistency" Requirements Were Not Applicable To San Diego

While state legislation requires all cities to adopt a general plan with certain mandatory elements (including an open space element [Calif. Gov. Code §§ 65302(e), 65700]), charter cities, such as San Diego, are expressly exempted from the consistency provisions (unless expressly adopted by charter or ordinance) by California Government Code Sections 65700 and 65803.[67]

The other statute which SDG&E relies on (Calif. Gov. Code § 66474) is found in the Subdivision Map Act and would apply only where a subdivision map is not consistent with the general plan.

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66 In accord: *HFH, Ltd. v. Superior Court,* 15 Cal.3d 508, 516 (1975), cert. den. 425 U.S. 904 (1976); *Pinheiro v. County of Marin, supra,* 60 Cal.App.3d 323, 328; *Dale v. City of Mountain View,* 55 Cal.App.3d 101, 108-109 (1976).

67 *Dale v. City of Mountain View, supra,* 55 Cal.App.3d 101, 108, n. 5.

SDG&E is incorrect in stating that any industrial use of its property would require a subdivision map. City's Planning Director testified in answer to a hypothetical question which assumed a type of industrial development prevalent to the southeast of the subject property that in that situation "we *probably* would require a subdivision map. . . ."[68] [Emphasis added.] He also stated that he believed a map would be required for division of the property.[69] The only other evidence is the testimony of Mr. Worley that, "I would also *presume* that a development of this magnitude would *likely* result in the requirement for . . . a subdivision map . . ."[70] [emphasis added] in response to a particular hypothetical industrial development.

Reference in the Open Space Plan to the State Map Act does not establish a policy of requiring consistency, let alone a policy which is mandatory upon City. In fact, the evidence was that the City Council did approve a substantial development in an area designated open space in the general plan.

c. Even If Consistency Were Required, Reasonable Use Could Be Made Of The Property.

There is no substantial evidence in the record to support a conclusion that there was no reasonable use of the property which could be consistent with the Open Space Plan, even assuming that the only feasible use of the property was for industrial purposes.

The Open Space Plan is flexible and subject to change. It was to be submitted to the state following adoption and was intended to serve as one of a series of background reports on various elements that were to

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68 J.App. 135-136.

69 J.App. 136.

70 J.App. 93.

comprise City's revised general plan.[71] It was to be comprehensively reviewed no less than every two years.[72]

The Plan discussed two major categories of open space: one which would be kept essentially free of structural improvements and generally designated for acquisition; the other being lands that can retain a high degree of utility as open space though some development may occur if sensitively planned.[73]

While SDG&E's land was proposed for acquisition by the Plan map there was nothing which precluded other approaches to preserving open space. Among the approaches discussed by the Plan was use of flood-plain zones.[74]

The Plan makes only generalized references to public acquisition, stating that acquisition must be carefully weighed in terms of limited financial resources available and other factors.[75]

Most importantly, the text of the Plan, referring to the subject property, states:

> . . . [SDG&E] has a large (240 acre) ownership which it intends to utilize as the location of a nuclear power plant sometime in the 1980's. Again, such a facility, if sensitively designed and sited, could be compatible with open space preservation in this subsystem.[76]

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71 J.App. 157.

72 Plaintiff's Exhibit 11, p. 40 [R.T. 36, 39].

73 Plaintiff's Exhibit 11, p. 12 [R.T. 36, 39].

74 Plaintiff's Exhibit 11, p. 8 [R.T. 36, 39].

75 Plaintiff's Exhibit 11, pp. 9, 35 [R.T. 36, 39].

76 J.App. 160.

The requirement of "consistency" is not sufficiently precise to be susceptible to a legal conclusion as to its application. The term "consistency with" in the context of development and the general plan is a relative one and depends upon a particular fact situation. In this regard, the California Attorney General has opined:

> . . . it is apparent that consistency between the subdivision map and the general plan does not require an exact identity, rather that the proposed tentative or final subdivision map be in agreement with or harmonious with the general or specific plan.
>
> Without being presented with a specific factual setting, it is difficult to state with any degree of certitude what sort of subdivision would be consistent or inconsistent with any particular general or specific plan.
>
> 59 Ops.Cal.Att'y Gen. 129, 131 (1976).

SDG&E misstates the evidence in stating that City's Planning Director testified that he did not know of an industrial use that would be consistent with open space. (Appellant's Brief, p. 14.) The pertinent part of the record is as follows:

> Q. Now, do you consider that any industrial development on this portion of the property indicated in brown on Plaintiff's 1 across the way would leave the property primarily in its natural state?
>
> A. I think there could be a design for industrial development on that property that would achieve essentially what's called for here, yes, sir. I haven't seen one, but I think that that's possible.
>
> Q. And do you think that that design would leave the property with value for park and recreation purposes?

> A. I think it could be either that or, as the definition indicates, complement the adjacent area for said purposes.[77]

Mr. Goff's testimony related to particular property. The reason he had not seen such a design is that none had ever been submitted.

Mr. Goff also testified that the City Planning Department reviews, makes recommendations to the Planning Commission and City Council on land use proposals but it would not be proper for the Planning Department to recommend against a development solely because of an open space designation.[78]

SDG&E's witnesses testified as though the Open Space Plan has totally superseded the general plan so that open space was the only use designated for the property by the general plan, but the resolution adopting the Plan merely recites the state requirement for it and adopts it without reference to the general plan.[79] Comparing this resolution with those adopting the Torrey Pines Community Plan and amending the general plan accordingly,[80] it is clear that no amendment of the general plan map was made by adopting the Open Space Plan.

The result is that where implementation of the Open Space Plan is infeasible, development may proceed in accordance with the general plan map designation and underlying zoning.[81]

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77 J.App. 143.

78 R.T. 338:2-8; J.App. 134; R.T. 359:22-26--360:1-25; J.App. 139-140.

79 J.S.App. K-10.

80 Defendant's Exhibits E and F [R.T. 346, 394]; R.T. 356:6-22. These resolutions specifically recite that the community plan is not effective until the general plan is amended and incorporates the plan into the general plan map.

81 This is consistent with the advice of the City Attorney's Office to the City Council at the hearing to adopt the Open Space Plan to the effect that the Plan would not "deep-freeze" the property--that if efforts to acquire properties were to fail the underlying zoning would control development. J.App. 135.

The case of *Sierra Club v. County of Alameda, supra,* 73 Cal.App.3d 572, supports the position that City could allow industrial or other development of the subject property consistent with open space.

In that case, permission to develop 145 acres out of 2,555 acres (about 6%) was granted for substantial recreational facilities and structures. A condition of the permit was that the balance of 2,410 acres shall be used only for a cattle ranch and trails, and otherwise remain undeveloped. The court held the permit was consistent with open space because it served some, although not all, of the goals of the open space element and required a commitment of 2,410 acres of land to a type of open space which would not otherwise have been possible except by the county payment therefor.

3. Other Conduct.

Other conduct by City consisted of planning activities to acquire open space and a direction by the City Council to staff to determine a schedule of open space areas which could be rezoned with agricultural, floodplain or L.C. zoning (a hillside review zone). These actions had no effect upon the use of the subject property either as a legal or physical constraint and there is no finding that they constituted unreasonable precondemnation conduct.

This Court has recently agreed with the California Supreme Court that good faith planning activities not resulting in an eminent domain proceeding are not a compensable interference with property rights. *Agins v. City of Tiburon, supra,* ____ U.S. ____, 65 L.Ed.2d 106, 113, n. 9.

4. Conclusion That Only Reasonable Use Was Industrial.

Appellant's witnesses ruled out some potential uses of the property due to economic infeasibility, ruled out others because not consistent with the general plan designation, and failed to consider uses permitted by conditional use permit such as: structures and uses by a public utility,

research, development and testing laboratories and facilities.[82] They did not consider any potential use as being reasonable if not economically feasible from an investment standpoint.[83]

Nor was the property valueless after the City's actions according to SDG&E's witness who testified that it had a "nominal" value of $1,000 per acre for the gross usable portion.[84]

5. The Decision Below Did Not Affirm The Trial Court's Findings.

The second Court of Appeal opinion (J.App. 63) did not affirm the trial court's findings nor does it address City's contention that there was no substantial evidence to support the findings. In fact, by stating that SDG&E had made no application or inquiry to City for use of the property it throws serious doubt on the finding that it would have been futile for such application.

B. THERE IS NO EVIDENCE THAT THE PROPERTY HAS BEEN DEVOTED TO PUBLIC USE

No actual public use has been made of or required on SDG&E's property as a result of City's actions. No existing use by SDG&E has been terminated or interfered with and no applications for use have been denied.

The property was unused and undeveloped when purchased by SDG&E and it remained in the same condition after the acts complained of.

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82 J.App. 103-105, 123-125, 149-150. The witnesses also ruled out some uses on spurious reasons, *e.g.*, motel use--property not as close to the beach as Mission Bay; recreational vehicle park--usually are only about 10 acres. J.App. 105.

83 J.App. 104-105, 110, 115, 123-126, 76, 81-82.

84 J.App. 126.

C. APPELLANT MAY NOT SEEK JUDICIAL RELIEF FROM THE APPLICATION OF THE LAND USE REGULATIONS WITHOUT APPLYING FOR DEVELOPMENT

This Court recently stated, "Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions." *Agins v. City of Tiburon, supra,* ____ U.S. ____, 65 L.Ed.2d 106, 111.[85]

The cases of *Sneed v. County of Riverside,* 218 Cal.App.2d 205 (1963) and *Furey v. City of Sacramento,* 24 Cal.3d 862 (1979), cited by SDG&E as excusing them from applying for relief from zoning restrictions, are distinguishable. *Sneed* involved actual use of the property for public purposes and an existing use was interfered with. *Furey* involved an open space ordinance which prevented any change from its zoning for a substantial period and an actual denial of one plaintiff's application for relief.

California courts have recognized an exception to the requirement to exhaust administrative remedies where "the aggrieved party can positively state what the administrative agency's decision in his particular case would be." *Ogo Associates v. City of Torrance,* 37 Cal.App.3d 830, 834 (1974).

Here, there was no substantial evidence to bring SDG&E under the exception. The trial court's finding on this point is based on two erroneous premises: (1) that City was compelled by state law to reject any development not consistent with open space; and (2) that there was no reasonable use consistent with open space, or City would reject any reasonable use as being inconsistent.

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[85] California is in accord: *Metcalf v. County of Los Angeles, supra,* 24 Cal.2d 267, 269; *Pan Pacific Properties, Inc. v. County of Santa Cruz,* 81 Cal.App.3d 244, 249-251 (1978); *People v. Superior Court, supra,* 91 Cal.App.3d 95, 104-105.

The legal point has been addressed above. The second premise is based on pure speculation.

Mr. De Vore testified he was unaware of any specific instance to support his opinion that City would deny an application for development.[86] Mr. Worley's testimony (admitted for the limited purpose of why SDG&E didn't apply for permits)[87] was that he would have advised a client of the futility of application based on two instances, one in which City allowed development notwithstanding an open space designation, and another in which City denied, but which he could not say was solely due to the open space designation.[88] Mr. Worley also said that the City Council "would most likely" interpret any use of the property consistent with its zoning as being inconsistent with open space, "especially if it didn't want the property developed."[89] Mr. Gallagher relied on SDG&E's attorney and Mr. Worley to support his opinion which was otherwise based on examples in other jurisdictions.[90]

SDG&E's argument that there is no administrative remedy for a constitutional violation presupposes that there is a violation, *i.e.*, that no reasonable use is allowed. Yet the purpose of the exhaustion of remedies doctrine is to determine if in fact there has been such a violation where there exists administrative or legislative discretion which may determine what use or development may be made. Here that discretion clearly

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86 J.App. 84.

87 The trial court sustained City's objection to this testimony offered for the purpose of proving what City Council might do on an application stating, ". . . he's endeavoring to infer an opinion from an opinion," but allowed it for the purpose stated. J.App. 90-91, 93.

88 Mr. Worley's example involved denial of a subdivision map. Since there are other valid reasons for denial of a map, a court will not presume it was solely due to an open space designation. *City of Walnut Creek v. Leadership Housing Systems,* 73 Cal.App.3d 611, 621 (1977).

89 J.App. 95.

90 J.App. 128-129.

existed by way of conditional use permits which would allow industrial development even in the agricultural zone and in interpreting what type of development plan might be consistent with open space.

The words of the court in *People v. Superior Court, supra,* 91 Cal.App.3d 95, 104, 105, are particularly relevant here:

> One compelling reason for requiring property owners to seek commission permits before raising inverse condemnation claims is that the commission should be put to the task of deciding specific cases. Its position should not be inferred from general comments of staff and from broad statements about priorities for acquisition.
>
> . . . Here, although property owners might have reason to expect that a one-year delay condition might be imposed upon their building and that the ultimate result might be state purchase, they had no good reason to anticipate outright denial of a permit. The bypassing of the administrative process denied the commission the opportunity to strike a reasonable balance between public and private interests. There is no room for a presumption that the commission will invariably sacrifice private interests to its concept of the public good.

Furthermore, an application for development of property may be the very impetus which causes an amendment to a general plan, assuming such was necessary, which, as noted in *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, is tentative and subject to change.

D. REASONABLE LAND USE REGULATIONS ARE VALID EXERCISES OF THE POLICE POWER AND ARE NOT COMPENSABLE DUE TO LOSS OF VALUE OF PROPERTY

This Court has long recognized that:

> . . . The police power is one of the least limitable of governmental powers and in its operation often cuts down property rights.
>
> *Queenside Hills Realty Co. v. Saxl, supra,* 328 U.S. 80, 83.

The Court has also recognized that mere diminution in market value of property due to enactment of zoning regulations does not give rise to constitutional taking or otherwise render the regulation invalid, notwithstanding a substantial reduction in value. *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 384 (1926) (75% diminution); *Hadacheck v. Sebastian, supra,* 239 U.S. 394, 405 (93% diminution).

Nor has the fact that a regulation deprives property of its most beneficial or profitable use been held determinative of its validity or whether a "taking" has occurred. *Goldblatt v. Town of Hempstead, supra,* 369 U.S. 590, 592; *Andrus v. Allard,* 444 U.S. 51, 66 (1979).

Recently this Court has affirmed these principles, citing its many prior cases:

> . . . [I]n instances in which a state tribunal reasonably concluded that "the health, safety, morals or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized property interests.
>
> *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 125 (1978).

Appellant does not contend that the zoning or Open Space Plan do not serve legitimate police power objectives. This Court has recently agreed with the State of California's recognition that open space legislation serves legitimate governmental goals. *Agins v. City of Tiburon, supra,* ____ U.S. ____, 65 L.Ed.2d 106, 112. Such objectives as coastal resources protection (Calif. Pub. Res. Code § 3000 et seq.) and flood protection (*e.g.,* 42 U.S.C. 4102) are also unquestionably legitimate governmental goals.

E. THE REGULATIONS HAVE NOT VIOLATED CONSTITUTIONAL RIGHTS

1. Reasonable Investment-Backed Expectations.

It is well established that a property owner has no vested rights in existing or anticipated zoning, at least where no actual use of the property exists. *Hadacheck v. Sebastian, supra,* 239 U.S. 394, 410.

This Court has also stated:

> . . . the submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.
>
> *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104, 129.

And, ". . . loss of future profits . . . provides a slender reed upon which to rest a takings claim." *Andrus v. Allard, supra,* 444 U.S. 51, 62 L.Ed.2d 210, 223.

As stated by the California Supreme Court,

> The long settled state of zoning law renders the possibility of change in zoning clearly foreseeable to land

> speculators and other purchasers of property, who discount their estimate of its value by the probability of such changes.
>
> *HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, 521.

It follows, in view of the nature of a general plan as set forth above, that the same principle is true as to general plan designations for use of property.

SDG&E had no right to expect that the zoning of its property would remain unchanged until it was ready to make use of it, nor did it have a reasonable expectation that the portions zoned agricultural when purchased would be rezoned to industrial when it wanted them to be.

A considerable amount of time passed from SDG&E's purchase and the actions of which it complains. City could not have bargained away its right to exercise the police power for the common good simply because it sold 25 acres of the land to SDG&E. *Acker v. Baldwin,* 18 Cal.2d 341, 345 (1941).

Furthermore, SDG&E took the position at the rezoning hearings on its property that the proposed rezoning would not have any effect on its long range plans.[91] SDG&E's reasonable investment-backed expectation was that this property may be suitable for a potential nuclear power plant which complied with all governmental restrictions and conditions in effect at the time of construction.

If it had any expectation that the property could be developed for the type of intensive industrial development that it proposed at trial, such expectation simply was not reasonable.[92]

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91 J.App. 148.

92 To accomplish such a development entailed rezoning of portions zoned agricultural, placing 3 to 4 feet of fill material altering a natural floodplain and ecologically sensitive property, and obtaining necessary coastal permits. (*E.g.,*

(Footnote continued on page 35)

To condone such an expectation would be to allow economics to dictate land use planning and controls at the expense of reasonable regulation for the general welfare and safety.

While this Court has stated that impacts on economic and investment-backed expectations are relevant considerations in "taking" cases, the adoption of a test based on economic feasibility of development of property, while at first blush appealing, would be impractical and produce results such as the case at bench based on speculative testimony. Such a test is especially unreasonable where economically marginal lands, as here, are purchased on speculation for a unique purpose at high cost and subsequent market conditions and costs dictate what use is economically feasible notwithstanding the existing development regulations and physical nature of the property.

California courts have rejected such a test as being nothing more than a statement that the property suffered a loss in value. *Pinheiro v. County of Marin, supra,* 60 Cal.App.3d 323, 325.

The crux of SDG&E's frustrated expectations is disclosed by Mr. De Vore's testimony that, "It's always envisioned that the property will not, in any event, go down in value. . . ."[93]

2. Balancing Competing Interests.

The Open Space Plan and rezoning advance very important public interests, including public safety (landslides and flooding), preservation of endangered wildlife, as well as the enhancement of life and aesthetic considerations.

Footnote 92 continued

Calif. Pub. Res. Code § 27401(a) required a two-thirds vote to issue a permit for "dredging, filling, or otherwise altering any bay, estuary, salt marsh, river mouth, slough, or lagoon," and see § 27402.)

93 J.App. 69.

These interests are surely as important as a property owner being able to make the most profitable use of his property. The character of the governmental action is a relevant consideration and interference with property arising from a public program adjusting the benefits and burdens of economic life to promote the common good are less likely to run afoul of the constitution. *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104, 124.

In light of the effect of the regulations here, the nature of the property, and the public purposes to be served, it cannot be said that SDG&E is bearing an unfair burden.

II

EVEN IF THE REGULATIONS WERE OVERLY BURDENSOME, THE APPROPRIATE REMEDY IS EQUITABLE RELIEF, NOT DAMAGES[94]

A. THERE IS NO PRECEDENT FOR HOLDING THAT THE CONSTITUTION COMPELS DAMAGES AS A REMEDY FOR AN EXERCISE OF THE POLICE POWER WHERE THERE HAS BEEN NO PHYSICAL INVASION OF PROPERTY RIGHTS

SDG&E relies on the oft-quoted passage from the case of *Pennsylvania Coal Co. v. Mahon, supra,* 260 U.S. 393, 415, that, ". . . while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," and the many subsequent cases which quote it.

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[94] Due to City's belief that the facts here are of crucial importance on the "taking" issue and its extensive discussion of that issue, the following discussion is somewhat cursory due to limits on the length of briefs. The issue is of great importance, and if the Court believes a "taking" has occurred, City directs the Court's attention to the more extensive treatment of this issue in amici's briefs; *e.g.,* National Trust For Historic Preservation and California Coastal Commission.

However, none of these cases, including *Pennsylvania Coal,* have actually held that a land use regulatory measure which is overly burdensome requires compensation or that such amounts to an exercise of the power of eminent domain entitling the owner to bring an inverse condemnation action.

The *Pennsylvania Coal* case was an equitable action where an injunction was sought by owners to prohibit the removal of subsurface coal based on a law restricting the removal. This Court refused to uphold the granting of an injunction because to uphold it would amount to a "taking" of the coal companies' property rights.

Pennsylvania Coal is distinguishable in that an existing use was being terminated and to enforce the law would have given the property owners rights which they had knowingly contracted away.

Although the Court used the term "taking" in *Pennsylvania Coal,* it is clear that it was used in a due process sense, not in the eminent domain context.

As was stated by the New York Court of Appeals:

> True, many cases have equated an invalid exercise of the regulating zoning power, perhaps only metaphorically, with a "taking" or a "confiscation" of property, terminology appropriate to the eminent domain power and the concomitant right to compensation when it is exercised. . . .
>
> The metaphor should not be confused with the reality. Close examination of the cases reveals that in none of them, anymore than in the *Pennsylvania Coal* case (*supra*), was there an actual "taking" under the eminent domain power, despite the use of the terms "taking" or "confiscatory". Instead, in each the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under

> the due process clause, and the cases were decided under that rubric.
>
> *Fred F. French Investment Co. v. City of New York, supra,* 385 N.Y.S.2d 5, 8-10, 350 N.E.2d 381, dism. 429 U.S. 990 (1976).[95]

Cases relied on by appellant and its amici involve actual eminent domain actions, physical damage to property, contractual rights, or instances where Congress authorized public improvement projects, appropriated monies and authorized the use of eminent domain to carry them out.[96]

The recent case of *Kaiser Aetna v. United States, supra,* 444 U.S. 164, is also distinguishable in that the navigational servitude there, if upheld, would result in an actual physical invasion of the property. Nor did this Court in that case compel the government to acquire an easement and to pay for it by reasoning that the attempted regulation had been transformed into an exercise of the eminent domain power.

Although the Court has stated that it does "not embrace the proposition that a 'taking' can never occur unless government has transferred

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[95] Likewise, the California Supreme Court said, ". . . the term 'taking' was used solely to indicate the limit by which acknowledged social goals of land control could be achieved by regulation rather than by eminent domain." *Agins v. City of Tiburon, supra,* 24 Cal.3d 266, 274.

[96] *E.g., United States v. Clarke,* ___ U.S. ___, 100 S.Ct. 1127 (1980); *United States v. Lynch,* 188 U.S. 445 (1903) (physical damage); *Davis v. Newton Coal Co.,* 267 U.S. 292 (1925) (confiscation and use); *Ivanhoe Irrigation Dist. v. McCracken,* 357 U.S. 275 (1958); *Armstrong v. United States,* 364 U.S. 40 (1960) (contractual rights); *Monongahela Navigation Co. v. United States,* 148 U.S. 312 (1893); *Olson v. United States,* 292 U.S. 246 (1934) (eminent domain); *Hurley v. Kincaid,* 285 U.S. 95 (1932); *Danforth v. United States,* 308 U.S. 271 (1939); *United States v. Dickinson,* 331 U.S. 745 (1947); *United States v. Gerloch Live Stock Co.,* 339 U.S. 725 (1950); *Dugan v. Rank,* 372 U.S. 609 (1963); *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974) (instances where monies were authorized to carry out projects).

physical control over a portion of a parcel" (*Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104, 123, n. 25), it does not follow that some physical invasion or interference with existing uses is not necessary,[97] even assuming the Court was using the term "taking" in the eminent domain sense.

B. THE CONSTITUTION DOES NOT COMPEL A DAMAGE REMEDY

Appellant's argument that an exercise of the police power if overly burdensome becomes an exercise of the power of eminent domain fails to distinguish between two distinct governmental powers.

> Under the power of eminent domain property cannot be taken for public use without just compensation. However, under the police power property is not taken for use by the public; its use by private persons is regulated or prohibited where necessary for the public welfare.
>
> *Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com.,* 11 Cal.App.3d 557, 571 (1970).

As stated in *Mugler v. Kansas,* 123 U.S. 623, 669 (1887), "In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."

The Fifth Amendment provides in relevant part:

> No person shall . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private

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97 The Court has emphasized that instances of physical invasion are different from regulations which merely diminish value of property. *Kaiser Aetna v. United States, supra,* 444 U.S. 164, 180; *Andrus v. Allard, supra,* 444 U.S. 51, 62 L.Ed.2d 210, 222; *Penn Central Transp. Co. v. New York City, supra,* 438 U.S. 104, 124.

> property be taken *for public use*, without just compensation. [Emphasis added.]

In the regulatory situation we have here, there is no "public use" such as is contemplated by the takings clause. Also, to argue that mere legislation which is overly burdensome comes within the takings clause ignores the due process clause of the Fifth Amendment.

The California Supreme Court has discussed this concept of public use stating:

> . . . The doctrine of inverse condemnation rests upon the theory that after property has been devoted to a public use by a defendant so that it would seriously interfere with the service furnished by the defendant to the public if such use is discontinued public policy dictates that such use should not be discontinued and the property owner's only relief in such a situation is an action for the value of the property taken and the damages to his remaining property by way of inverse condemnation. (Citations omitted.) To make this doctrine applicable, however, the property must in fact have been devoted to a public use by the defendant to the extent that the public interest would suffer by the discontinuance of such use. "The doctrine of inverse condemnation . . . can be properly applied only where a public use has attached."
>
> *Cothran v. San Jose Water Works,* 58 Cal.2d 608, 614 (1962).

The constitution is satisfied when the overly burdensome legislation is invalidated.[98]

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[98] Many state courts are in agreement with the California courts: *Eck v. City of Bismark,* N.D., 283 N.W.2d 193 (1979); *Gary D. Reihart, Inc. v. Township of Carroll,* Pa., 409 A.2d 1167 (1979); *Holaway v. City of Pipestone,* Minn., 269 N.W.2d 28 (1978); *Davis v. Pima County,* 121 Ariz. 343, 590 P.2d 459 (1978); *Fred F. French Investment Co. v. City of New York, supra,* 385

(Footnote continued on page 41)

C. PUBLIC POLICY DICTATES THAT NO INVERSE CONDEMNATION REMEDY BE RECOGNIZED HERE

1. Adequacy Of Equitable Remedies.

Appellant and its amici argue that the California Supreme Court has totally abolished the remedy of inverse condemnation or money damages in land use regulation cases leaving woefully inadequate equitable remedies. Yet that court left intact the right to recover for decline in market value of property resulting from unreasonable delay or conduct prior to condemnation,[99] and has upheld inverse condemnation where access has been denied to property.[100] There remains a statutory remedy for inverse condemnation where eminent domain proceedings are not brought within six months of adopting a resolution of necessity to condemn.[101]

The California courts also retain the right to compel the issuance of a permit[102] or to preclude the application of regulations.[103]

It is argued that the California courts are reluctant to invalidate regulations; thus it is not an adequate remedy. In light of the authorities set forth above, it is not surprising that the courts do not readily invalidate

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Footnote 98 continued

N.Y.S.2d 5, 350 N.E.2d 381; *Mountain Medical, Inc. v. City of Colo. Springs,* Colo. App., 608 P.2d 821 (1980); *Mailman Development Corp. v. City of Hollywood,* Fla. App., 286 So.2d 614 (1973).

99 *Agins v. City of Tiburon, supra,* 24 Cal.3d 266, 278.

100 *Jones v. People ex rel Dept. of Transp.,* 22 Cal.3d 144, 152 (1978).

101 California Code of Civil Procedure, Section 1245.260.

102 *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 123.

103 *Furey v. City of Sacramento, supra,* 24 Cal.3d 862, 877-888.

these regulations. They may not be set aside merely because of hardship or denial of the most profitable use of one's property. The implication of this argument is that the courts would be more willing to impose damages. In essence, appellant argues that a landowner's financial losses due to proper exercises of the police power ought to be compensated for. This is, of course, directly contrary to the many holdings of this Court.

Appellant's amici also argue that invalidation is inadequate because the public entity will continue to frustrate the landowner by enacting new laws that serve to frustrate development. Implicit in such arguments is the belief that legislative bodies have ulterior motives in adopting land use regulations. This is borne out by amici's argument that damages are necessary as a remedy to serve as a deterrent.

This is certainly not a common practice by public entities, and where it does occur the courts in California have ample remedies to deal with it, including damages, as pointed out above.

In citing *Owen v. City of Independence,* ____ U.S. ____, 63 L.Ed.2d 673 (1980), appellant draws upon tort law (*ibid,* at 684). Such theory should not apply to legislative actions, as here, where no actual interference of rights has occurred. As the California Supreme Court recognized citing this Court, "of course, it is not a tort for Government to govern. . . ."[104]

Furthermore, the California Supreme Court at least implied that "direct and special interference" with a property owner's rights other than a denial of access may justify an inverse condemnation action.[105]

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104 *HFH, Ltd. v. Superior Court, supra,* 15 Cal.3d 508, 519; *Dalehite v. United States,* 346 U.S. 5, 57 (1952) (Jackson, J. dissenting).

105 *Jones v. People ex rel Dept. of Transp., supra,* 22 Cal.3d 144, 152.

2. Separation Of Powers.

To provide a remedy in inverse condemnation would permit the landowner to elect to sell his property and the courts to enforce such sale to a public entity regardless of whether the elected officers felt the expenditure was prudent or funds available. Thus the courts would be substituting their judgment for that of the legislative body in violation of the doctrine of separation of powers. *Village of Euclid v. Ambler Realty Co., supra,* 272 U.S. 365, 388.

In attempting to exercise the police power to regulate land use, the Legislature certainly is not determining to purchase the property to achieve its ends. That decision should be left to the governing body and will be where the courts determine the regulation cannot be upheld as a police power measure.

3. Chilling Effect Upon The Exercise Of Governmental Powers.

The ill-effects of urbanization and the increasing necessity to preserve our natural resources are important matters recognized by the courts as being proper subjects of land use regulations.[106]

In order to deal with these increasing problems effectively, public entities must have the flexibility to utilize new and untested approaches in land use planning.

Appellant's amici argue that governments must be responsible for their land use actions. Implicit in their argument is that public entities know in advance the exact effect of their land use actions on the properties affected. Such an assumption is unwarranted.

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106 *Agins v. City of Tiburon, supra,* ____ U.S. ____, 65 L.Ed.2d 106, 112; *Agins v. City of Tiburon, supra,* 24 Cal.3d 266, 275.

The public entity does not have the resources to predict with any degree of certainty the effect on specific parcels of property especially when in the arena of economic feasibility of use. Such results are often dictated by the landowner, *e.g.*, the purchase price of the property or the intended use of it. Or, they may be determined by changing and uncontrolled factors such as market and cost factors.

To make the legislative bodies subject to these variables and often unpredictable impacts at the risk of having to purchase the properties for errors in judgment would have the practical effect of divesting the legislative body of its responsibilities of representing the common interest.

Such a possibility which could result in financial havoc with any municipal budget would certainly have an inhibiting effect.

Here, where the primary action affecting SDG&E's land was a planning designation for open space, the warning by the California Supreme Court is particularly relevant:

> If a governmental entity . . . were held subject to a claim for inverse condemnation merely because a parcel of land was designated for potential public use on one of these several authorized plans, the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations. . . .
>
> *Selby Realty Co. v. City of San Buenaventura, supra,* 10 Cal.3d 110, 120.

The ultimate effect would be to cut out the public as a participant in land use planning for fear that planning in public may result in a forced purchase of property.

The California Supreme Court also rightly questioned the effect on the use of the initiative power to regulate land use which is responsible for major legislation in California. Are the voters to have the power to inadvertently or perhaps intentionally commit public funds?

Another aspect of allowing inverse condemnation is that in states such as California where the power of eminent domain may only be used for purposes authorized by statute,[107] the statute may be subverted.

Nor should this Court be willing to require public entities to pay for exercises of the police power which protect the public safety against flood hazards. If a landowner may assert such a taking claim because he may not substantially alter property in order to make intensive development in the valley reaches of three river systems of a floodplain, then government will either have to buy all floodplains or leave them unregulated at the risk of public safety and later public expense for disaster relief.[108]

CONCLUSION

For the reasons stated, there has been no denial of all reasonable use of appellant's property. Appellant's claim is based on speculation and misinterpretation of law. The California Supreme Court was correct in its conclusion and reasoning in *Agins v. City of Tiburon, supra,* and the decision below is correct in refusing to grant appellant relief. In fact, this Court is justified in dismissing the case on jurisdictional grounds. Alternatively, the decision below should be affirmed.

Dated: October 3, 1980

Respectfully submitted,

JOHN W. WITT, City Attorney

By: C. ALAN SUMPTION, Deputy

Attorneys for Appellee

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107 *City & County of San Francisco v. Ross,* 44 Cal.2d 52, 55 (1955).

108 See Sax, *Takings, Private Property & Public Rights,* 81 Yale L.J. 149 (1971).

APPENDICES

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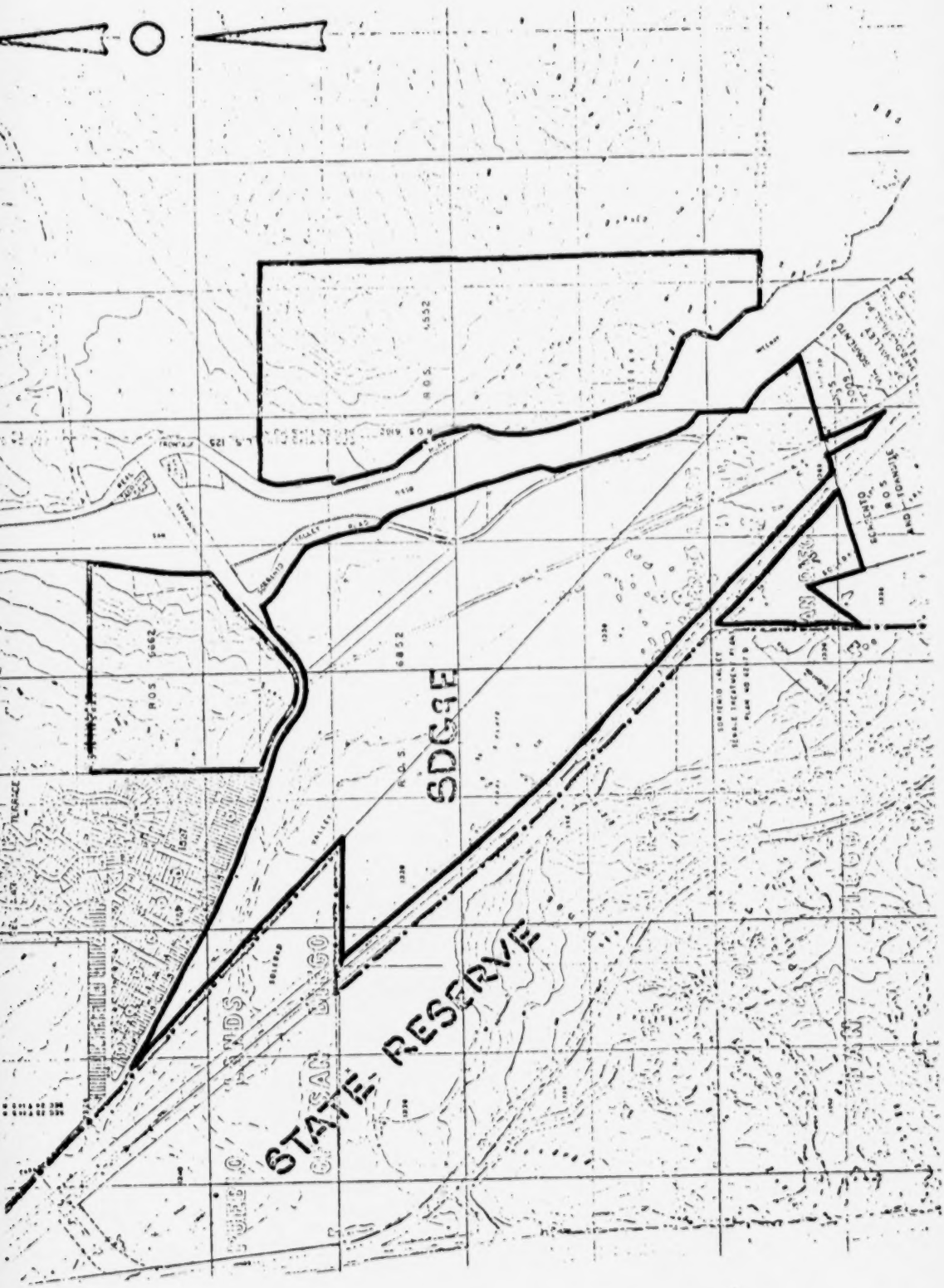


Excerpts From City Of San Diego Ordinance No. 9408 (New Series) Adopted April 21, 1966, And From Ordinance Nos. 9407 (New Series) And 9382 (New Series) Incorporated Into Ordinance No. 9408 (New Series)

SEC. 101.0436 M-1A ZONE Ordinance No. 9408 (New Series)

In the M-1A Zone, no building or premises shall be erected, constructed, converted, established, altered, and/or enlarged or used except for one or more of the uses permitted in the M-1 Zone under conditions and requirements set forth in Section 101.0437; provided, however:

(1) The following uses shall be prohibited:

(a) Churches;

(b) Dwellings, whether single-family or multiple-family, including house trailers, except one dwelling on the same lot or parcel of land which is legally being used so as to require the continuous supervision of a caretaker or superintendent and his immediate family;

(c) Hospitals, except for emergency hospitals incident to uses permitted in this zone;

(d) Hotels, motels, rooming houses, boarding houses and all other similar uses offering lodging to guests;

(e) Institutions or homes for the treatment or care of convalescent persons, children, aged persons, alcoholics, the wounded or mentally infirm;

(f) Schools, public and private, except for trade schools instructing in subjects incidental to a permitted use;

(g) Trailer parks;

(h) All signs not directly relating to the particular use of the property on which they are located;

SEC. 101.0437 M-1 ZONE Ordinance No. 9407 (New Series)

In an M-1 Zone, no building or premises shall be erected, constructed, converted, established, altered and/or enlarged or used except for one or more of the following uses:

1. Any use permitted in Zones R-1, R-2, R-4 and C.
2. Aeroplane manufacture.
3. Boat and canoe building.
4. Building materials storage.
5. Bottling works.
6. Bakery.
7. Blacksmith shop.
8. Cabinet making or carpenter shop.
9. Carting, express, storage yard.
10. Carpet or bag cleaning.
11. Central electric plant.
12. Cleaning and dyeing works.
13. Contractor's plant or storage yard.
14. Concrete pipe storage.
15. Creamery.
16. Ice cream manufacture.
17. Ice manufacture (less than 20 tons).
18. Impound storage yard.
19. Lumber yard.

20. Laundry.

21. Machine shop.

22. Metal working shop.

23. Milk distributing station.

24. Novelty or toy manufacture.

25. Outdoor advertising plant.

26. Potato chip manufacture.

27. Paper or pulp manufacture.

28. Saw planing, woodworking mill.

29. Stone dressing or cutting.

30. Storage warehouse.

SEC. 101.0433 C ZONE Ordinance No. 9382 (New Series)

In a C Zone, no building or premises shall be erected, constructed, converted, established, altererd and/or enlarged or used except for one or more of the following uses:

(1) Any use permitted in Zones R-1, R-2, R-4 or RC;

(2) Amusement place located entirely within a building, or golf practice range;

(3) Armory;

(4) Assembly hall;

(5) Athletic park;

(6) Auto paint and repair shop;

(7) Automobile, automobile trailer (usable), retail sales yard; or parking lot or garage;

(8) Bank, office or studio;

(9) Barber shop;

(10) Bath house;

(11) Billboard or advertising structure;

(12) Cleaning and dyeing works (not more than ten employees);

(13) Dancing academy;

(14) Funeral parlor;

(15) Furniture storage (provided all loading off street);

(16) Retail gasoline and fuel oil station;

(17) Hotel;

(18) Ice delivery station;

(19) Laundry (not more than ten employees);

(20) Machine shop (limited to 10 H.P. electric operated);

(21) Needle and millinery craft;

(22) Newspaper and job printing;

(23) Nursery and pottery retail sales yard;

(24) Photograph gallery;

(25) Plumbing shop;

(26) Public garage;

(27) Retaurant;

(28) Schools (trade or vocational);

(29) Store, retail;

(30) Store, for the conduct of a wholesale business where not more than 25% of the total floor area of building is used for storage, packaging of goods, wares, or merchandise and/or not more than 25% of the open area of the premises may be used for storage, provided, however, that all open storage spaces or areas shall be enclosed by a six (6) foot solid enclosure wall;

(31) Shoe repair shop;

(32) Shop for custom work on wearing apparel, fabrics, upholstery, window drapes and curtaining;

(33) Theater;

(34) Manufacturing and processing incidental to any of the above uses conducted on the premises and where the total power of all equipment does not exceed 10 H.P. and that not more than 15% of total floor area of building may be used for manufacturing.

Excerpts From City Of San Diego Ordinance
No. 8706 (New Series) Adopted August 16, 1962

SEC. 101.0404 A-1 ZONES - AGRICULTURAL

A. PURPOSE AND INTENT

The purpose of adopting this section of the San Diego Municipal Code and creating permanent A-1 (Agricultural) Zones is to provide appropriate zoning, with well-defined uses, of areas, which are rural in character, and presently may be zoned for agricultural purpose, only on an interim basis; it is the intention of the City Council that the A1-1, A1-5, A1-10 Zones be applied to undeveloped areas not yet ready for urbanization and awaiting development, those areas where agricultural usage may be reasonably expected to persist or areas designated as open space in the general plan.

B. PERMITTED USES

In a zone designated by the symbol "A1", followed by a number, the number shall determine in acres the minimum area of a lot in that zone, and on which no building or improvement, or portion thereof, shall be erected, constructed, converted, established, altered or enlarged, nor shall any premises be used except for one or more of the following purposes:

1. Single-family dwellings
2. Churches
3. Private stable
4. All agricultural uses, except the maintaining, raising, feeding or keeping of swine; provided that any dairy or the maintaining, raising, feeding, or keeping of ten (10) or more domestic animals (as defined in Municipal Code Section 44.0318) is located on premises containing five (5) or more acres.
5. Public utility substations
6. Killing and dressing of poultry, fowl, or rabbits raised on the premises, provided that any building so used shall be not less than fifty (50) feet from any property line.

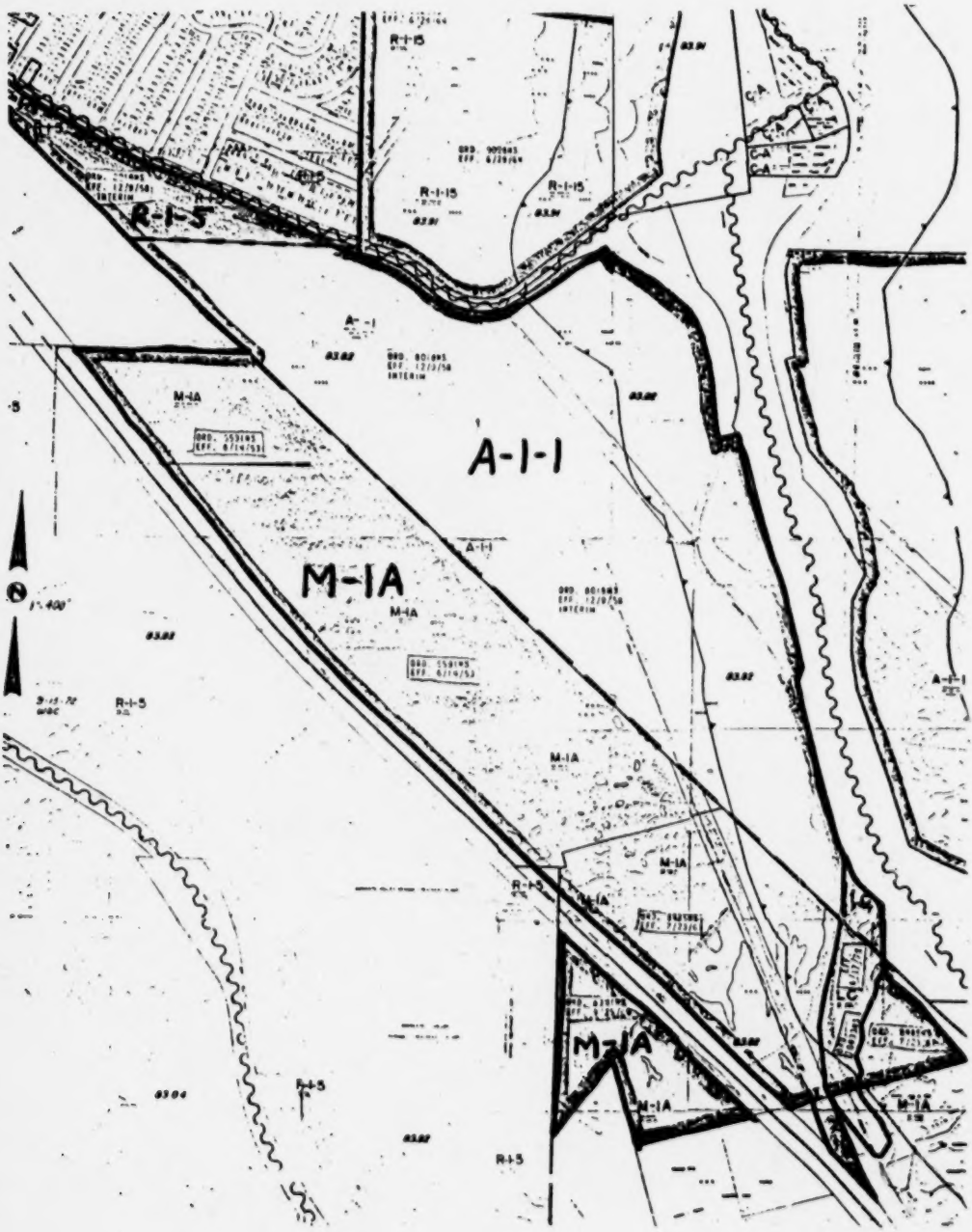
7. Commercial riding, training, or boarding horse stable, provided that such stable shall be located on a lot containing not less than five (5) acres.

8. Harvesting, processing, or selling of crops produced on the same premises.

9. One stand exclusively of wood frame construction (except the floor), and not exceeding 300 square feet in gross floor area, for the display and sale of agricultural crops produced on the same premises.

10. Accessory buildings and uses customarily incidental to any of the above uses, . . .

D-1



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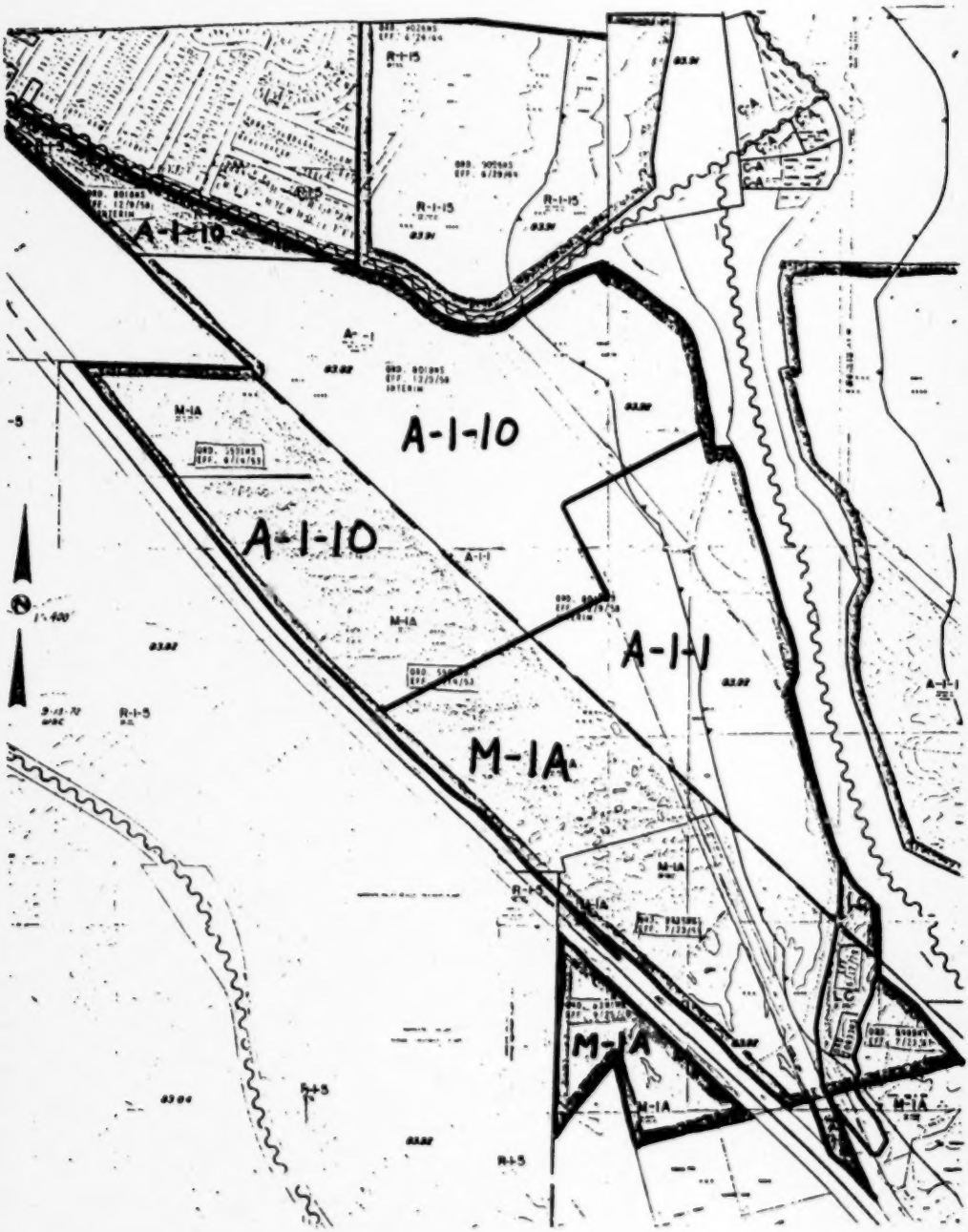
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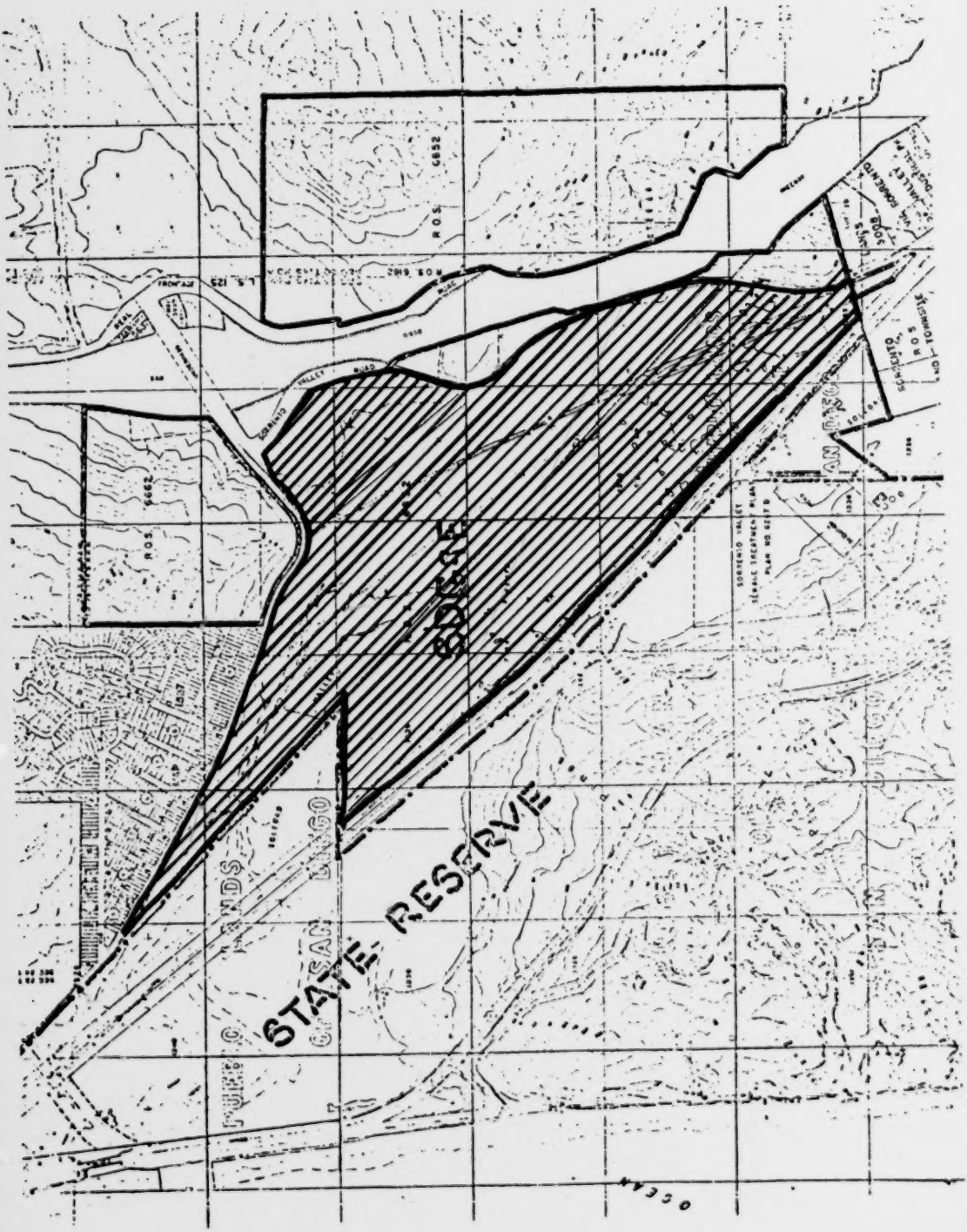

Excerpt From City Of San Diego Charter Section 90

SECTION 90. CONTRACTING BONDED INDEBTEDNESS.

(a) Whenever the Council shall determine that the public interest or necessity demands the acquisition, construction or completion of any municipal improvement authorized to be acquired, constructed, completed or maintained by The City of San Diego, the cost of which will be too great to be paid out of the ordinary annual income and revenue of said City, the Council may contract bonded indebtedness for said purposes or any of them, pledging the credit of the City or the property or revenue of any public utility owned by the City and the proceedings taken for incurring such indebtedness shall be in accordance with the mode and manner prescribed by the provisions of the general laws of the State of California relative to incurring bonded indebtedness by municipalities in force at the time such proceedings are taken. Every ordinance or resolution determining that the public interest or necessity demands such improvement shall be adopted only by a vote of five members of the Council and it shall require a vote of two-thirds of the electors voting on each proposition at a regular or special election for the issuance of such bonds before said indebtedness or liability for said improvements may be incurred, except ordinances authorizing such bond issues as are specified in Section 92 of this Article. . . .